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AmBank (M) Bhd (formerly known as MBf Finance Bhd) v KT Steel Sdn Bhd & Ors

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FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02()-18 OF 2010(J)
RICHARD MALANJUM CJ (SABAH AND SARAWAK), HASHIM YUSOFF AND MOHD GHAZALI FCJJ
19 JANUARY 2012

C

Contract — Agreement — Equipment lease agreement — Alleged default in rental payments under lease agreement — Whether lease agreement was money lending transaction in disguise — Whether lease agreement bona fide transaction — Whether agreement prohibited by any Act — Whether agreement was bill of sale — Whether agreement void by reason of some principle of law — Whether High Court judge and Court of Appeal erred in fact and in law — Bills of Sale Act 1950 s 4 — Banking and Financial Institutions Act 1989 s 60

D

E

Contract — Guarantees — Validity — Guarantee only signed by three out of four sureties — Whether void

F

The first defendant, a locally incorporated company, applied for a leasing loan of RM2.5m from the plaintiff, a licensed finance company, to finance the purchase of a piece of machinery ('the mill equipment'). The plaintiff approved the application and the plaintiff and first defendant entered into an equipment lease agreement (the lease agreement) whereby the plaintiff as the lessor agreed to lease the mill equipment to the first respondent as the lessee at a monthly rental for an agreed period of 60 months. Vide a letter of guarantee, the second, third and fourth defendants, who were directors of the first defendant company, undertook to guarantee all sums owing by the first defendant under the lease agreement. The first defendant defaulted in its monthly rental payments. Consequently, the plaintiff filed an action to claim the rental payments outstanding under the lease agreement together with other charges, interest and costs. The defendants disputed the claim and contended that the purported lease agreement was illegal and void for non-registration by virtue of s 4 of the Bills of Sale Act 1950 ('BSA'). The defendants alternatively averred that as the loan was granted without security it contravened s 60 of the Banking and Financial Institutions Act 1989 ('BAFIA').The defendants also averred that the guarantee was not valid as a director of the first defendant, one R Gevage, whose name appeared in the letter of guarantee had not signed the same. The defendants then counterclaimed for a declaration that the lease agreement was not valid because it did not comply with the BSA and for a declaration that it contravened s 60 of the BAFIA. The High Court held that

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the lease agreement, which was in fact a sham to cloak and disguise a loan agreement, was void because of non-compliance with the BSA and the BAFIA and that the guarantee was also tainted by illegality and thereby unenforceable. When the High Court dismissed the plaintiff's claim with costs, it appealed to the Court of Appeal. The Court of Appeal also held that the lease agreement was a loan agreement and dismissed the plaintiff's appeal and awarded costs to the defendants in the sum of RM10,000. The plaintiff obtained the leave of this court to proceed with the present appeal. The plaintiff submitted that the lease agreement was a genuine lease agreement and that if the court found the lease agreement to be a loan agreement then the sums payable under the agreement were still recoverable as a loan, albeit as an unsecured agreement and not a bill of sale. The defendants argued that since the first defendant owned the mill equipment it could not be said to have leased the equipment from the plaintiff and that therefore the lease agreement was a sham agreement for a money lending transaction.

Held allowing the appeal and dismissing the defendants' counterclaim with costs:

(1) The plaintiff, a licensed finance company falling within the contemplation of s 2 of the BAFIA, was licensed to, inter alia, give credit facilities and conduct leasing business. That is the concept of lease financing. A lease transaction was a commercial arrangement, which involved a contract between the owner of an asset ('the lessor') and its user (the lessee) for the right to use the asset during a specified period in return for a mutually agreed periodic payment (the lease rentals). In the instant case the first defendant applied for a leasing loan and not a conventional loan. The monies approved under the leasing loan were disbursed by the plaintiff to the first defendant and the latter utilised it towards paying for the purchase of the mill equipment. Premised on the plaintiff's letter of approval for the leasing loan read together with the lease agreement, there was no illegality in the transaction. This court ruled that neither statute nor public policy was against an equipment lease. The evidence showed that the lease agreement was a bona fide transaction and it was preposterous to label it as a sham to cloak and disguise a money lending transaction. There was clearly a flaw in the conclusion of facts and on the law reached by the trial court and the Court of Appeal (see paras 34–36 & 42–44).

(2) The fact that a director of the first defendant, one R Gevage, did not sign the letter of guarantee although his name appeared therein was a non-issue. It was a joint and several guarantee and further that director was not a party to these proceedings (see para 41).

(3) The trial judge had not explained how he concluded that the lease agreement was a bill of sale and hence void for non-registration and the

Court of Appeal had not dealt with this issue at all. As the first defendant was paying rental for the use of the mill equipment, pursuant to the lease agreement, the lease agreement could not be said to be a bill of sale. The issue as to whether the lease agreement was a bill of sale was a question of fact for the trial judge to determine, but he had failed to do so. The trial judge was wrong to assume that the lease agreement was a bill of sale just because the defendants pleaded so (see paras 48 & 50).

(4) As there were flaws in the conclusion of facts and the law reached by the trial court and the Court of Appeal, the judgment and all orders of the High Court and the Court of Appeal were set aside (see para 51).

[Bahasa Malaysia summary

Defendan pertama, sebuah syarikat yang diperbadankan, memohon untuk pinjaman pajakan sebanyak RM2.5 juta daripada plaintif, sebuah syarikat kewangan berlesen, untuk membiayai pembelian sebuah jentera ('peralatan pengisar'). Plaintif telah meluluskan permohonan tersebut dan plaintif dan defendan pertama memeterai perjanjian pajakan peralatan ('perjanjian pajakan') di mana plaintif sebagai pemajak bersetuju untuk memajakkan peralatan kilang kepada responden pertama sebagai pemajak pada kadar sewa bulanan bagi tempoh yang telah dipersetujui selama 60 bulan. Melalui surat jaminan, defendan kedua, ketiga dan keempat, yang merupakan pengarah-pengarah syarikat defendan pertama, mengakujanji untuk menjamin kesemua jumlah wang yang terhutang oleh defendan pertama di bawah perjanjian pajakan. Defendan pertama gagal dalam bayaran bulanan sewanya. Berikutan itu, plaintif telah memfailkan satu tindakan untuk menuntut bayaran sewa yang tertunggak di bawah perjanjian pajakan bersama-sama dengan caj lain, faedah dan kos. Defendan-defendan mempertikaikan tuntutan tersebut dan menegaskan bahawa perjanjian pajakan dikatakan adalah menyalahi undang-undang dan tidak sah kerana ketidakdaftaran di bawah s 4 Akta Bil Jualan 1950 ('ABJ'). Secara alternatifnya, defendan menegaskan bahawa memandangkan pinjaman tersebut telah diberi tanpa jaminan ia melanggar s 60 Akta Bank dan Institusi-Institusi Kewangan 1989 ('ABIK'). Defendan-defendan juga menegaskan bahawa jaminan tidak sah kerana pengarah defendan pertama, R Gevage, yang namanya muncul dalam surat jaminan tidak menandatanganinya. Defendan kemudiannya menuntut balas bagi suatu deklarasi bahawa perjanjian pajakan tersebut tidak sah kerana tidak mematuhi ABJ dan bagi suatu deklarasi bahawa ia melanggar s 60 ABIK. Mahkamah Tinggi memutuskan bahawa perjanjian pajakan, yang sebenarnya palsu untuk menyembunyi dan menyamarkan perjanjian pinjaman, adalah tidak sah kerana tidak mematuhi ABJ dan ABIK dan bahawa jaminan tersebut juga dicacatkan dengan menyalahi undang-undang dan dengan itu, tidak boleh dikuatkuasakan. Apabila Mahkamah Tinggi menolak tuntutan plaintif dengan kos, ia merayu kepada Mahkamah Rayuan. Mahkamah Rayuan juga berpendapat bahawa perjanjian pajakan adalah

perjanjian pinjaman dan menolak rayuan plaintif dan kos yang diberikan kepada defendan dengan jumlah RM10,000. Plaintif mendapat kebenaran mahkamah ini untuk meneruskan dengan rayuan tersebut. Plaintif menghujahkan bahawa perjanjian pajakan adalah perjanjian pajakan tulen dan bahawa jika mahkamah mendapati perjanjian pajakan sebagai perjanjian pinjaman maka jumlah wang yang perlu dibayar di bawah perjanjian tersebut masih boleh didapatkan sebagai pinjaman, walaupun sebagai satu perjanjian yang tidak bercagar dan bukan bil jualan. Defendan-defendan menghujahkan bahawa oleh kerana defendan pertama memiliki peralatan kilang, ia tidak boleh dikatakan telah memajak peralatan daripada plaintif dan dengan itu perjanjian pajakan adalah perjanjian palsu bagi transaksi pinjaman wang.

Diputuskan membenarkan rayuan dan menolak tuntutan balas defendan-defendan dengan kos:

(1) Plaintif, sebuah syarikat kewangan berlesen yang terangkum dalam dalam tafsiran s 2 ABIK, adalah berlesen untuk, antara lain, memberi kemudahan kredit dan menjalankan perniagaan pemajakan. Itu adalah konsep pembiayaan pajakan. Satu transaksi pajakan adalah satu aturan komersil, yang melibatkan kontrak di antara pemilik aset ('pemberi pajak') dan pengguna ('pemajak') untuk hak menggunakan aset dalam tempoh tertentu sebagai balasan untuk pembayaran berkala yang dipersetujui bersama (sewa pajakan). Dalam kes ini, defendan pertama memohon untuk pinjaman pajakan dan bukan pinjaman konvensional. Wang yang diluluskan di bawah pinjaman pajakan telah dikeluarkan oleh plaintif kepada defendan pertama dan defendan pertama menggunakannya untuk membayar pembelian peralatan kilang. Berdasarkan surat kelulusan bagi pinjaman pajakan yang dibaca bersama-sama dengan perjanjian pajakan plaintif, tidak terdapat kesalahan undang-undang dalam urus niaga. Mahkamah ini memutuskan bahawa kedua-dua statut mahupun dasar awam adalah terhadap pajakan peralatan. Bukti-bukti yang menunjukkan bahawa perjanjian pajakan adalah transaksi bona fide dan ia adalah tidak munasabah untuk melabelkannya sebagai palsu untuk menyembunyi dan menyamarkan transaksi pinjaman wang. Jelas terdapat kecacatan dalam kesimpulan fakta dan undang-undang yang diputuskan oleh mahkamah bicara dan Mahkamah Rayuan (lihat perenggan 34–36 & 42–44).

(2) Hakikat bahawa seorang pengarah defendan pertama, R Gevage, tidak menandatangani surat jaminan walaupun namanya muncul di dalamnya bukanlah satu isu. Ia merupakan satu jaminan bersama dan berasingan dan selanjutnya pengarah tersebut bukan merupakan pihak kepada prosiding ini (lihat perenggan 41).

(3) Hakim bicara tidak menerangkan bagaimana dia menyimpulkan bahawa

perjanjian pajakan adalah satu bil jualan dan dengan itu tidak sah bagi ketidakdaftaran dan Mahkamah Rayuan tidak menangani isu ini sama sekali. Oleh kerana defendan pertama telah membayar sewa bagi penggunaan peralatan kilang, selaras dengan perjanjian pajakan, perjanjian pajakan tidak boleh dikatakan sebagai bil jualan. Isu sama ada perjanjian pajakan ialah satu bil jualan adalah persoalan fakta untuk ditentukan oleh hakim bicara tetapi beliau telah gagal untuk berbuat demikian. Hakim bicara terkhilaf dengan menganggap bahawa perjanjian pajakan adalah bil jualan hanya kerana defendan-defendan memplidkan sebegitu (lihat perenggan 48 & 50).

(4) Memandangkan terdapat kelemahan dalam kesimpulan fakta dan undang-undang yang diputuskan oleh mahkamah bicara dan Mahkamah Rayuan, penghakiman dan semua perintah Mahkamah Tinggi dan Mahkamah Rayuan diketepikan (lihat perenggan 51).]

Notes

For cases on agreement in general, see 3(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 2798–2834.

For cases on validity of guarantee, see 3(3) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 4842–4853.

Cases referred to

Syarikat Bunga Raya Timor Jauh Sdn Bhd & Anor v Tractors Malaysia Bhd [1980] 2 MLJ 127 , FC (refd)

Legislation referred to

Banking and Financial Institutions Act 1989 ss 2, 60, 60(1)
Bills of Sale Act 1950 ss 3, 4
Contracts Act 1950 ss 2(g),(j), 24, 97
Sale of Goods Act 1957 ss 19, 20

Appeal from: Civil Appeal No J–02–351 of 2007 (Court of Appeal, Putrajaya)

Hargopal Singh (Sukhjit Kaur Gill with him) (Hargopal Singh & Co) for the appellant.

S Palanivel (S Surendran with him) (Palani Aishah & Co) for the respondents.

Mohd Ghazali FCJ (delivering judgment of the court):

[1] On 13 October 2010 this court granted the appellant leave to appeal on the following questions of law:

(a) whether a lease agreement for business equipment declared to be a money lending transaction/loan agreement is a bill of sale under s 3 of the Bills of Sale Act 1950;

(b) whether a lease agreement for business equipment declared to be a money lending transaction/loan agreement is illegal and void under s 4 of the Bills of Sale Act 1950;

(c) whether a lessee who has executed a document titled a lease agreement and thereafter expressly referred to the document as a lease agreement in its subsequent correspondences is estopped from denying that the agreement is a lease agreement when it does satisfy the requirement of a lease agreement;

(d) whether a lessor must be seised with ownership of the equipment leased at all material times; and

(e) whether a lessee (borrower) has to repay the monies advanced by the lessor (lender) pursuant to a lease agreement that had been declared illegal and void.

[2] The appellant (the plaintiff in the originating action) is a licenced finance company. The first respondent (the first defendant in the originating action) is a locally incorporated company and was incorporated on 21 September 1993. The second, third and fourth respondents (the second, third and fourth defendants in the originating action) were the directors of the first respondent.

THE FACTS

[3] By a 'Contract of Sale Agreement' dated 1 September 1996, the first respondent ('the buyer') purchased a used piece of machinery, described therein as 'the mill equipment' ('the said mill equipment') from M & M Greaves ('the seller'), a business enterprise based in Sheffield, England for the sum of £750,000.

[4] As a consequence of the said 'Contract of Sale Agreement', the first respondent made an application for a leasing loan on 27 September 1996 in the sum of RM2.5m from the appellant for a proposed period of 60 months to finance the purchase of the said mill equipment. It was stated in the application that the cost of the said mill equipment was RM2,925,000 and that the deposit paid was RM425,000.

[5] By letter dated 12 October 1996 ('the letter of offer') the appellant approved in principle the application for the leasing loan, referred to therein as an 'Equipment Lease Facility' and informed the first respondent that 'under this facilities, we shall purchase the equipment … and thereafter, we will

lease/hire it to you based on the following terms and conditions' which, inter alia, included the following:

(a) a monthly rental of RM50,792 for 59 months and a final rental of RM50,772 for the 60th month;

(b) 'at the end of the lease period you will undertake to indeminity (sic) us that the resale value of the equipment should realise not less than RM234,000-00'; and

(c) 'Security/Guarantee — (a) Equipment purchase by us and thereafter leased to you will be covered by our Standard Equipment Lease Agreement. The terms and conditions of which has been agreed by you.'

[6] Paragraph 16 of the letter of offer reads:

Lessee/Hirer As Agent For MBf Finance Bhd:

The lessee shall be the agent for MBf Finance Berhad for the following purposes:

(a) For placing the order for the equipment and that the invoice is to be sent direct to MBf Finance Berhad for payment.

(b) If the lessee for whatever reasons make payments to the dealer/manufacturer such payments shall be deemed to have been made on MBf Finance Berhad's behalf and reimbursement shall be made to the lessee for the purpose of this lease.

(c) Accepting delivery of the equipment on behalf of MBf Finance Berhad and which without further act, irrevocably constitutes delivery and acceptance of equipment by lessee from lessor.

[7] Paragraph 21 of the letter of offer reads:

Termination:

Lease will be non-cancellable but the lessee can repay all remaining and outstanding rentals after the end of the 24th month at a discount of 4% per annum.;

and para 25(b), inter alia, reads:

The equipment is leased on a 'as is' basis.

[8] On 30 October 1996 the board of directors of the first respondent resolved that the company accept the lease facility.

[9] On 20 March 1997 the appellant and the first respondent entered into an 'Equipment Lease Agreement' ('the said lease agreement') wherein the appellant is described as 'the Lessor' and the first respondent as 'the Lessee'. The

terms of the letter of offer were also incorporated in the said lease agreement. The following articles of the said lease agreement would be relevant, namely:

(a) Article 1 (Lease Equipment):

> The Lessor hereby agrees to Lease to the Lessee and the Lessee hereby agrees to take on Lease the equipment... for the period and upon the terms and conditions herein set forth and SUBJECT ALWAYS to the due and punctual payment of the rent hereinafter mentioned …;

(b) Article 7 (Delivery of Equipment):

> (1) The Lessee shall inspect the Equipment and issue to the Lessor an Acceptance Receipt …;

(c) Article 8 (Ownership):

> The Lessee acknowledges that ownership and title to the Equipment after delivery thereof to the Lessee shall remain vested in the Lessor and the Lessee shall have no right or interest therein otherwise than as bailee thereof and it is agreed that the Equipment shall at all times remain the sole and exclusive property of the Lessor.;

(d) Article 12 (Defects in Equipment):

> (1) The Lessee, having negotiated with the Seller and having on its own accord selected the Equipment for its own use on Lease, hereby acknowledges and declares that the Lessor shall not in any manner be responsible for any defects or for the quality or fitness of the Equipment or any part or parts thereof.;

(e) Article 21 (Default):

> (1) If the Lessee fails to pay the Rent provided under Article 3 hereof after the same becomes due and payable or any other sums or monies due and payable under this Lease Agreement … the Lessor have the right forthwith to excise all or any of the following remedies without having to give any prior notice or demand to the Lessee:
>
> (a) to declare a part of or the entire amount of the total amount of the rent for the whole period of the initial Term payable under this Lease Agreement and all other moneys, sum, costs and expenses under this Lease Agreement immediately due and payable by the Lessee;
>
> (b) to take possession of the Equipment or demand its return;
>
> (c) to terminate the Lease hereby created and to demand from the Lessee the sum calculated in accordance with Article 24 hereinafter provided and in addition thereto to claim for compensation for all loss and damages including but not limited to loss or profits.;

(f) Article 27 (Sale of Equipment on Early Termination):

> (1) Equipment surrendered to or repossessed by the Lessor on early termination shall be sold by private treaty by the Lessor as it deems fit.;

(g) Article 42 (No Option to Purchase):

> This Lease Agreement shall at no time and shall under no circumstances whatsoever be deemed to be or read as a hire purchase agreement as defined in the Hire Purchase Act, 1967 and no option to purchase the Equipment is conferred to the Lessee.

[10] Vide a 'Letter of Guarantee' dated 20 March 1997 ('the said letter of guarantee'), ie, on the same day when the said lease agreement was entered into by the parties, the second, third and fourth respondents, viz, the directors of the first respondent undertook to guarantee all sums owing by the company under the said lease agreement The appellant was referred to therein as 'the Lessor'. Section 2.01 of the said letter of guarantee reads:

> In consideration of the Lessor's promise to lease the said Equipment at our request upon the terms and conditions of the Lease, we hereby jointly and severally guarantee repayment to the Lessor all sums of money together with interest costs charges and all other sums payable by the Lessee in the event of the Lessee's default in paying interest due under the Lease or in the repayment of the Lease or any part thereof or the breach of any terms governing the Lease by the Lessee. Our liability herein is co-extensive with that of the Lessee.

[11] The first respondent paid only 21 monthly rent payments (the term of lease was for 60 months) and thereafter defaulted. Consequently the appellant filed this action and claimed the rent payments outstanding under the said lease agreement together with other charges, interest and costs; vide para 11(a), (b), (c) and (d) of the statement of claim, the appellant claimed the sum of RM1,757,517.91 and interest on that sum at 6.5%pa until date of realisation and costs.

[12] In their statement of defence, the respondents disputed the claim and contended that the appellant failed to comply with the provisions of the Bills of Sale Act 1950 and in the alternative averred that the loan was made without security and hence contravened s 60 of the Banking and Financial Institutions Act 1989. They further averred that the said letter of guarantee is not valid as a director of the first respondent named R Gevage a/l Ramasamy, whose name appeared in the said letter of guarantee did not sign the same.

> (Note: s 60(1) of the Banking and Financial Institutions Act 1989 reads 'Subject to an order made by the Bank under subsection (2), no licenced institution shall give to any person any credit without security.')

[13] The respondents then counterclaimed for a declaration that the said lease agreement was not valid as it did not comply with the Bills of Sale Act 1950. In addition to and in the alternative, they sought a declaration that the said lease agreement contravened s 60 of the Banking and Financial Institutions Act 1989.

THE HIGH COURT

[14] According to the learned trial judge, Syed Ahmad Helmy Ahmad J (as he then was), as reflected in his grounds of judgment dated 28 March 2007, 'the sole issue for determination as agreed upon by the parties is whether the equipment lease agreement dated 20 March 1997 is a lease agreement or a loan agreement void under the Bills of Sale Act 1950 for non-registration under s 4 thereof'.

[15] At the end of the day the trial judge dismissed the appellant's claim with costs; he made the following findings:

(a) that under ss 19 and 20 of the Sale of Goods Act 1957 the property in and the ownership of the said mill equipment had passed to the first respondent; there is no evidence on record to show that the ownership of the said mill equipment was purchased or transferred to or belong to the appellant;

(b) that since the appellant 'expressly covenanted' in the said lease agreement that the 'Lessor has agreed to purchase/has purchased the Equipment', it has the onus of proving that 'they have assumed the ownership of the Equipment through documentary evidence which onus the Plaintiff have failed to discharge';

(c) that for a lessor to lease the said mill equipment it must be seised with ownership and that evidence is lacking here;

(d) that the full sum of RM2.3m was disbursed to the first respondent on the same date as the execution of the said lease agreement and was paid directly to the first respondent and not directly to the seller of the said mill equipment and the seller issued the invoice in the name of the first respondent and not the appellant and this 'to my mind is clear contravention of clause 16(a) of the Letter of Offer'; and

(e) that vide cl 16(b) of the said letter of offer the appellant covenanted that there would be reimbursement of any monies paid by the first respondent; in relation to this, the monies that was released by the appellant on 20 March 1997 cannot qualify as 'reimbursement' as the payment to the seller was only effected on 25 March 1997 and hence 'the transaction cannot be an equipment lease agreement though labelled as such'.

[16] For the aforesaid reasons, the trial judge concluded that 'to all intents and purposes the equipment lease agreement was a loan on the security of the equipment and a bill of sale which by reason of it not being registered under the Bills of Sale Act 1950 makes the transaction void'.

[17] The trial judge then said:

> As I have stated to determine whether the transaction is a leasing agreement or otherwise it is necessary to look behind the equipment lease agreement to discover its true nature and if the facts are not truly stated in the documents there are circumstances tending to show that the documents were a mere cloak *Major Kassim Sharif v Kwong Yik Finance Bhd* [2001] 6 CLJ 397.
>
> Though the sum of RM2.3m was paid to the seller nevertheless there was still a shortfall occasioned by the Ringgit/Pound ratio which had escalated from 3.8:1 to 7.5:1 during the 1997 recession which shortfall was provided by the plaintiff to the seller pursuant to a bank guarantee dated 15 August 1997 in the seller's favour. By the terms of the guarantee the plaintiff acknowledge that the agreement to purchase the equipment was entered into by the first defendant and that the plaintiff guaranteed to pay the seller in the event the first defendant fails to make payment. The guarantee aforesaid reinforces the plaintiffs role as a financier to assist the first defendant to acquire the equipment for its business.

[18] With regards to the said letter of guarantee, the trial judge noted that only the second, third and fourth respondents signed the guarantee whereas the said R Gevage a/l Ramasamy did not sign. He then referred to s 97 of the Contracts Act 1950 which reads:

> Where a person gives a guarantee upon a contract that the creditor shall not act upon it until another person has joined in it as co-surety, the guarantee is not valid if that other person does not join.

[19] Premised upon what was discussed earlier, the trial judge summarised the reasons for his decision to be as follows:

(a) the property in or the ownership of the said mill equipment remained with the first respondent at all material times and the property in the said mill equipment never passed to the appellant;

(b) the said lease agreement 'is a sham to cloak and disguise the money lending transaction' and 'since it was money lending transaction and the purported Lease Agreement had not complied with the Bills of Sale Act 1950, it is illegal and void for non-registration by virtue of s 4 of this Act';

(c) since the loan and the guarantee was granted by the appellant without security, it has also violated s 60 of the Banking and Financial Institutions Act 1989;

(d) by virtue of s 24 of the Contracts Act 1950 the said lease agreement is void because of non compliance of the Bills of Sale Act 1950 and the Banking and Financial Institutions Act 1989;

(e) 'Since the Lease Agreement itself is an illegal transaction, the Letter of Guarantee is also tainted by illegality and is thereby unenforceable. Alternatively the guarantee is also void by reason of section 97 of the Contracts Act 1950 (reproduced earlier) as the guarantee was only signed by three out of the four sureties who were supposed to have signed the surety (sic)'; and

(f) 'The guarantee is void by reason of uncertainty as the name of the Lessee or the Lease Agreement was not stated in the guarantee and therefore there is no indication showing what the sureties were in fact guaranteeing'.

(Note: s 24 of the Contracts Act 1950 provides 'The consideration or object of an agreement is lawful, unless —

(a) it is forbidden by a law;

(b) it is of such a nature that, if permitted, it would defeat any law;

(c) it is fraudulent;

(d) it involves or implies injury to the person or property of another, or

(e) the court regards it as immoral, or opposed to public policy.

In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.)

COURT OF APPEAL

[20] The Court of Appeal dismissed the appeal by the appellant and awarded costs to the respondents in the sum of RM10,000. In delivering the judgment of the court Abdul Wahab Patail JCA said:

[12] … No evidence was placed before the court that the sale to the first respondent was novated or replaced with a sale to the appellant who then leased the equipment to the first respondent.

[13] On the face of it, one might ask why it should matter when the Appellant and the first respondent agreed to have the transaction between them appear to be an equipment lease agreement and not a loan transaction. If the issue whether the transaction or agreement is an equipment lease or a loan is one that is solely of a contract between the parties, it might not have mattered.

[14] But the issue arises because the law provided for a distinction between a hire purchase transaction and a loan transaction. In an equipment leasing, even though the hirer chooses the equipment, the equipment is sold to the 'financier',

who purchases the equipment and causes it to be delivered to the hirer for monthly lease payments. See *Malayan Credit Ltd v Mohamed Kassim* [1965] 1 LNS 111. It is recognised as not a financing transaction. On the other hand, a loan transaction is a money-lending transaction and is specifically regulated by legislation to require licensing, and without a license, the loan transaction is illegal null and void. Hence, in order to determine the true nature of the transaction rather than merely to see what the parties sought to make it appear to be, it is essential that the facts as a whole should be considered.

[15] The contract of sale agreement signed on 1 September 1996 between the first respondent and the seller M & M Greaves Machinery Atlas Works is a sale and purchase agreement and not an agreement to sell. It is not the appellant's case here or below that on 1 September 1996 it was an agreement to purchase and not a purchase by the first respondent. The first respondent is unequivocally stated to be the buyer. The application for a leasing loan was made on 27 September 1996, and the offer was made on 12 October 1996. The equipment lease transaction was thus sought, obtained and structured after a purchase by the first respondent. The submissions for the appellant focused entirely on the acts and results of the structuring of the transaction as an equipment lease. It however overlooked that the first respondent had purchased the equipment, and no amount of 'deeming' would change the fact the first respondent had purchased the equipment.

[16] The focus by the appellant to defend the transaction as a leasing transaction, and avoiding it being termed as a loan transaction, is somewhat strange as the facility was then offered under the name MBf Finance Bhd, unless it was not at the time licensed to give loans.

[17] It may seem that in the upshot the first respondent obtains an unconscionable advantage over the appellant as a result. Upon consideration, we hold the conclusion that the apparently unfair result and the threat similar advantage might be taken in future transactions, would discourage similar transactions and ensure that the objects of the law be achieved against unlicensed money-lending. To accept the appellant's approach will only encourage equipment and other lease transactions that are not bona fide leasing transactions but are in fact money-lending transactions.

[18] For the above reasons, we dismissed the appeal.

THE APPEAL BEFORE THIS COURT

Submission by the appellant

[21] Learned counsel for the appellant pointed out that before the High Court, the sole issue for determination was whether the said lease agreement was a genuine lease agreement or a loan transaction. The trial judge ruled that the said lease agreement being a loan agreement was void and illegal for non-registration by virtue of s 4 of the Bills of Sale Act 1950. The Court of Appeal also held that the said lease agreement was a loan agreement but

stopped there; the Court of Appeal never considered the relevant provisions of the Bills of Sale Act 1950. The Court of Appeal observed that such transactions must be discouraged to ensure that the objects of the law be achieved against unlicensed money-lending but failed to consider whether the appellant is a licensed financial institution.

[22] The arguments canvassed by counsel for the appellant can be summarised as follows:

(a) the said lease agreement was a genuine lease agreement;in the alternative, if the court finds the said lease agreement to be a loan agreement then the effect would be that the sums payable under the agreement are still recoverable as a loan, viz, it is an unsecured agreement and not a bill of sale;

(b) the provisions of the Bills of Sale Act 1950 do not apply to invalidate the said lease agreement;

(c) for a lease agreement for business equipment declared to be a money lending transaction/loan agreement it becomes a bill of sale under s 3 of the Bills of Sale Act 1950 only if the equipment is given to the lender as security for the loan;

(d) for a lease agreement for business equipment declared to be a money lending transaction/loan agreement to be declared illegal and void under s 4 of the Bills of Sale Act 1950, it must first be proven that the equipment was given to the lender as security for the loan;

(e) a lessee who has executed a document titled a lease agreement and thereafter expressly referred to the document as a lease agreement in subsequent correspondence may be estopped from denying that the agreement is a lease agreement if the correspondence all point to the fact that the agreement is a lease agreement;

(f) a lessor need not be seised with ownership of the equipment leased at the time of entering into the lease agreement; and

(g) a lessee (borrower) has to repay the monies advanced by the lessor (lender) pursuant to a lease agreement unless the agreement is void as a bill of sale, that is, a loan secured by the equipment financed and not registered pursuant to the Bills of Sale Act 1950 or an unlawful money lending transaction, that is, where the lender is an unlicensed money lender; as the appellant is a licenced financial institution the alleged loan is not invalid.

Submission by the respondents

[23] The arguments canvassed by learned counsel for the respondents can be summarised as follows:

(a) by virtue of the said 'Contract of Sale Agreement' the first respondent has

become the owner of the said mill equipment; the appellant has nothing to do with the said 'Contract of Sale Agreement';

(b) the first respondent has become the owner of the said mill equipment by virtue of ss 19 and 20 of the Sale of Goods Act 1957;

(c) thus, the first respondent who owns the said mill equipment at all material time cannot then be said to have leased the equipment from the appellant and therefore the said lease agreement 'is not [a] genuine one, it is a sham agreement for a money lending transaction'; it is a money lending or loan transaction that was couched in the form of an equipment lease agreement;

(d) being a money lending transaction 'couched in a sham equipment lease agreement', it has failed to comply with s 4 of the Bills of Sale Act 1950;

(e) it has become void because it was not attested and registered as required under the Bills of Sale Act 1950;

(f) Section 3 of the Bills of Sale Act 1950 defines any agreement entered into as a security of debt is a bill of sale and the personal chattels shall also include trade machineries, which is defined as the machinery used in or attached to any factory or workshop; the first respondent is a factory which had purchased the said mill equipment to be used and attached to its factory in Kota Tinggi;

(g) being a licensed finance company the appellant had violated s 60 of the Banking and Financial Institutions Act 1989 by granting facilities that are unsecured; and

(h) pursuant to s 2(g) and (j) of the Contracts Acts 1950, the said lease agreement cannot be enforced in law as it is void and by virtue of s 24 of the Contracts Act 1950 the agreement is void because of non-compliance of the Bills of Sale Act 1950 and the Banking and Financial Institutions Act 1989.

JUDGMENT

[24] What is exactly an equipment lease agreement? Basically, it is an agreement between two parties whereby one party wishes to rent equipment which is owned by the other for a specific period of time and consideration. In other words, equipment leasing is when a business obtains the use of equipment, eg, machinery on a rental basis. This avoids the need to invest capital in equipment. Ownership rests in the hands of the financial institution or leasing company, while the business has the actual use of it. It has been said that equipment leasing provide many benefits to business owners compared to the outright purchase or regular financing of equipment, such as minimal upfront costs, tax savings and minimal risk of equipment becoming obsolete.

[25] The business owner who is leasing the equipment is the 'lessee' and the bank or financial institution that is renting the equipment to the business owner is the 'lessor'. Legal title to the equipment stays with the lender, ie, the lessor but the business owner have the right to use the equipment according to the terms of the lease in exchange for regular payments made over the contracted period of time.

[26] In an article which appeared in the Malayan Law Journal and titled *Equipment Leasing in Malaysia: Some Legal Aspects and Problems* [1981] 1 MLJ xiii by Wong Kim Fatt, an advocate and solicitor, the learned writer said (at p xiii):

> The legal nature of equipment leasing is that of a contract of bailment. There are only a few sections (ss 101–124) in the Malaysian Contracts Act, 1950 (revised 1974), dealing with bailment, which is defined under s 101 as follows:
>
> 101. A 'bailment' is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. The person delivering the goods is called the 'bailor'. The person to whom they are delivered is called the 'bailee'.
>
> Explanation - If a person already in possession of the goods of another contracts to hold them as a bailee, he thereby becomes the bailee, and the owner becomes the bailor, of such goods, although they may not have been delivered by bailment.

[27] The learned writer of the aforesaid article then said (at p xiv):

> No court in Malaysia has attempted to define the term 'equipment leasing' …
>
> The Equipment Leasing Association, London, defines a lease as follows:
>
> A lease is a contract between a lessor and lessee for the hire of a specific asset selected from a manufacturer or vendor of such assets by the lessee. The lessor retains ownership of the asset. The lessee has possession and use of the asset on payment of specified rentals over a period.
>
> The fundamental purpose of a lease is to enable the lessee to acquire possession and use of the equipment without incurring its full capital cost, while at the same time allowing the lessor as owner to receive income or returns from the lessor's capital investment …
>
> Financial leases are the main source of income and main financial tool for a leasing company. In a financial lease, the services of the lessor, as the term suggests, are financial ones, i.e. the financing of the equipment leased or hired to the lessee who pays the rentals over regular specified intervals. A financial lease tends to be a full-payout transaction, that is the rentals payable by the lessee fully amortize the asset in the books of the lessor at the end of the primary leasing period. It is

> non-cancellable over a period of time with total rentals payable by the lessee exceeding the cost of the equipment. The lessee has no right or option to acquire title to the equipment. In the event of any breaches of the terms of the lease agreement, the lessor may terminate the agreement and assume immediate of the equipment. Primary risks to the lessor are the lessee's liability to pay the rentals punctually …

[28] According to the learned writer of the aforesaid article, the main features of a typical financial lease include the following:

(a) the lessor agrees to lease and the lessee agrees to take on lease a specified equipment on a fixed term at an agreed rental usually payable monthly; the agreement may stipulate a payment of deposit or prepaid rents;

(b) the lessee selects the equipment which the lessor purchases for lease to the lessee; the lessor is not responsible for any delay in delivery or non-delivery by the vendor or supplier of the equipment or for the defects, quality or fitness of the equipment;

(c) the lessee shall have possession and use of the equipment, subject to punctual payment of the rentals and observation of the covenants on his part contained;

(d) the ownership and title to the equipment shall remain vested in the lessor; the lessee shall have no right to acquire ownership and title to the equipment at a future date during the subsistence of the lease agreement; the lessee is prohibited from selling, assigning, sub-leasing or otherwise subjecting the equipment to encumbrances;

(e) the agreement provides for the right of the lessor to immediate termination of the agreement or immediate possession of the equipment in the happening of certain events prejudicial to the lessor, such as suspension or dissolution, winding-up or bankruptcy of the lessee, as the case may be, or when the lessee suffers execution, attachment or distress, or abandons the equipment; and

(f) provisions for charging and payment of interest on overdue payments.

[29] In another article, titled *Analysis of Equipment Leasing Contracts* released by the United Nations Centre on Transnational Corporations (United Nations Publication 1984), the features of leasing is explained as follows:

> The fundamental characteristic of leasing is the differentiation of use from ownership. The lessee is the bailee of the equipment and acquires the use of the equipment without the necessity of ownership. With the exception of those cases involving a purchase option, the lessor retains legal title to the equipment during and after the lease period.

> … the origin of the leasing operation is the bailment/contract of hire situation in which the lessor is the owner of the property and the lessee is entitled only to use rights of a varying magnitude.

[30] In relation to a finance lease, para 20 of the aforesaid article illustrated it as follows:

> A finance lease reflects a complex and, at times, triangular transaction whereby a 'financier' (the lessor) on the specifications of the 'user' (the lessee) purchases from a supplier plant, capital goods or equipment, the use of which he grants to the lessee. This transaction usually presents the following particular characteristics:
>
> (a) The choice of the equipment and the supplier lies with the lessee;
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> (b) The latter uses the equipment for business or professional purposes;
>
> (c) The equipment is purchased by the financier/lessor on the basis of a contract providing for its use which has either been concluded or is projected between the financier/lessor and the user/lessee;
>
> (d) The financier/lessor is the owner of the equipment provided for use;
>
> (e) The contract between the financier/lessor and the user/lessee is concluded for a term which takes the period of depreciation of the equipment into consideration;
>
> (f) The parties may choose from among various options either during the course or at the end of the contract between the lessor and the lessee.

[31] In the instant appeal, we do not think that it can be disputed that the appellant is a licenced finance company. Section 2 of the Banking and Financial Institutions Act 1989, which is an interpretation provision, states that a 'finance company' means 'a person which carries on finance company business' and 'finance company business' means:

> (a) the business of receiving deposits on deposit account, savings account or other similar account; and
>
> (b)
>
> (i) giving of credit facilities;
>
> (ii) leasing business;
>
> (iii) business of hire-purchase, including that which is subject to the Hire-Purchase Act 1967; or
>
> (iv) business of acquiring rights and interests in a hire-purchase, leasing or other similar transaction;
>
> (c) such other business as the Bank, with the approval of the Minister, may prescribe;.

In relation to the words 'leasing business' s 2 of the Act reads:

'leasing business' means —

(a) the business of letting or sub-letting movable property on hire for the purpose of the use of such property by the hirer or any other person in any business, trade, profession or occupation or in any commercial, industrial, agricultural or other economic enterprise whatsoever and, where the lessor is the owner of the property, regardless whether the letting is with or without an option to purchase the property, but does not include the business of hire-purchase which is subject to the Hire-Purchase Act 1967; and for the purpose of this definition, 'movable property' includes any plant, machinery, equipment or other chattel attached or to be attached to the earth or fastened or to be fastened, permanently or otherwise, to any thing attached to the earth; or

(b) such other business as the Bank, with the approval of the Minister, may prescribe;.

[32] In a book titled *Lease Financing & Hire-Purchase including Consumer Credit* by Vinod Kothari (3rd Ed), 1991, the learned writer, in describing the legal aspects of leasing said (at pp 292–293):

A lease of goods, or rental or hiring agreement is a contract under which one party for reward allows another the use of the goods. A lease may be for a specified period or in perpetuity. A lease differs from a hire-purchase agreement in that the lessee, or hirer, is not given an option to purchase the goods. Common law rules governing the rights of the parties to a hiring agreement are in large measure the same as for hire-purchase, but there are certain vital differences stemming from the absence of the option to purchase, and the triangular nature of the agreement combining the trio of the supplier,the lessor and the lessee.

NATURE OF THE HIRING AGREEMENT

A hiring agreement (or lease), unlike a hire-purchase agreement, is a contract of bailment plain and simple, with no element of sale inherent. A bailment has been defined in section 148 of the Indian Contract Act, 1872 as 'the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them'.

'The nature of an equipment lease is exactly as above. Therefore, most of the principles governing leases are those that govern agreements of bailments. Most of the countries of the world have not developed separate enactments governing leases'.

[33] At p 691 of his book, the learned writer distinguished hire-purchase from a lease as follows:

A contract of lease, legally called hiring agreement or rental agreement, differs from a hire-purchase agreement in that the former does not provide the hirer (lessee) an option to purchase the goods. Ownership remains vested in the owner throughout

> and the hirer is given no authority to acquire title. … However, where the hirer (lessee) is given the option to take perpetual lease, the agreement will tantamount to hire-purchase.

[34] In the instant case, the trial judge held that the said lease agreement 'is a sham to cloak and disguise the money lending transaction' and 'since it was money lending transaction and the purported lease agreement had not complied with the Bills of Sale Act 1950, it is illegal and void for non-registration by virtue of s 4 of this Act'. He also held that 'since the lease agreement itself is an illegal transaction, the letter of guarantee is also tainted by illegality and is thereby unenforceable'. The Court of Appeal dismissed the appeal by the appellant on the premiss that 'to accept the appellant's approach will only encourage equipment and other lease transactions that are not bona fide leasing transactions but are in fact money-lending transactions'.

[35] With respect, we find it difficult, if not impossible, to affirm the judgments of both the High Court and the Court of Appeal. It cannot be denied that the trial judge and the Court of Appeal rather misappreciated the whole matter from a different perspective resulting in misappreciation of the points in controversy. There is clearly a flaw in the conclusion of facts and on the law reached by the trial court and the Court of Appeal.

[36] This court has ruled that neither statute nor public policy is against a equipment lease. In *Syarikat Bunga Raya Timor Jauh Sdn Bhd & Anor v Tractors Malaysia Bhd* [1980] 2 MLJ 127 where the subject-matter were nine equipment leasing agreements, Chang Ming Tat FJ said (at p 128):

> It is not contended by the appellants that entering into an equipment leasing agreement is contracting outside the Hire Purchase Act (Revised) 1978 with its statutory provisions for the protection of hirers and the safeguard of the subject of the hire, which the courts will not sanction. In the same way as parties can agree to take a licence in preference to a lease of premises which would give the protection of the relevant Rent Acts: *Mohd Mustafa s/o Seeni Mohd v Kandasami s/o Kaliappa Gounder* [1979] 2 MLJ 109, *Demuren v Seal Estates* [1979] SJ 222; 249 EG 440 and *Rossvale v Green* [1979] SJ 610 250 EG 1183, it is similarly open to the parties to come to an agreement for a lease of equipment rather than to a hire-purchase agreement. To adapt the words of Geoffrey Lane LJ (as he then was) in *Aldrington Garages v Fielder* (1978) 247 EG 557: if there is here only a lease of goods and not a hire-purchase dressed up in the verbiage and trappings of a lease, the lessor is entitled to succeed in its action for recovery of possession, arrears of rentals and all the other claims in the agreement. Neither statute nor public policy is against a equipment lease: see also the recent decision of Eusoffe Abdoolcader J in *Tan Chin Kim Sawmill & Factory Sdn Bhd & Anor v Lindeteves-Jacoberg (M) Sdn Bhd* [1980] 2 MLJ 204. In fact equipment leasings confer certain advantages on both lessor and lessee principally in connection with tax reliefs available to both parties and the facility afforded to the lessee to return a piece of equipment which had become

obsolete at the end of the minimum period without having to incur liability for payment of its full value and to replace it: see Goode on *Hire-Purchase Law and Procedure* (2nd Ed), at pp 881–3.

[37] In the instant appeal, the following facts must be noted, namely:

(a) it was the first respondent which made the application for 'a leasing loan' from the appellant; it was stated in the application that the amount of loan applied was RM2.5m;

(b) the first respondent had possible alternative sources of finance and was not bound to enter into the said lease agreement with the appellant;

(c) the first respondent was aware of the terms and conditions of the said lease agreement and accepted them;

(d) the appellant had not been involved in the negotiations which led to the supply of the said mill equipment; and

(e) the first respondent paid the first 21 monthly rent payments for the said mill equipment without making any issue or challenging the validity of the said lease agreement but thereafter defaulted (there were 39 more monthly rent payments to be paid).

[38] It must also be noted that the said letter of offer, which is the appellant's letter of approval in principle to the application for a leasing loan, clearly stated that the first respondent (as lessee) shall be its agent for placing the order for the said mill equipment and that any payments to M&M Greaves shall be deemed to have been paid on behalf of the appellant (as lessor). We do not think it can be disputed that the monies approved under the leasing loan were disbursed by the appellant to the first respondent and the latter utilised it towards payment due to M&M Greaves for the purchase of the said mill equipment.

[39] With regards to ownership, article 8 of the said lease agreement clearly stated that the first respondent (as lessee) acknowledges that ownership and title of the said mill equipment, after delivery to the first respondent, shall remain vested in the appellant (as lessor) and that the first respondent shall have no right or interest therein otherwise than as bailee thereof and that the mill equipment shall at all times remain the sole and exclusive property of the appellant. Article 42 of the said lease agreement stated that the agreement 'shall at no time and shall under no circumstances whatsoever be deemed to be or read as a hire purchase agreement as defined in the Hire Purchase Act, 1967' and that no option to purchase the said mill equipment is conferred to the first defendant.

[40] Article 21 of the said lease agreement provide the remedies that the lessor have in the eventuality the first respondent defaults in its rental payments. A

[41] Another fact that is not disputed and must be noted is that in the said letter of guarantee, the second, third and fourth respondents 'jointly and severally guarantee repayment to the Lessor all sums of money together with interest costs charges and all other sums payable by the lessee in the event the Lessee's default' in its payments. We would think that the fact that a director of the first respondent named R Gevage a/l Ramasamy did not sign the said letter of guarantee although his name appeared therein is, to us, a non-issue. It was a joint and several guarantee and further, that director is not a party to these proceedings. B C

[42] Premised on the aforesaid material gleaned from the appellant's said letter of approval for the leasing loan read together with the said lease agreement, we cannot see any illegality in the transaction and hence find it difficult to comprehend the trial judge's finding that the agreement 'is a sham to cloak and disguise the money lending transaction'. It is clear as day that in such a transaction as this, there has to be financing on the part of the appellant, it being a licensed finance company falling within the contemplation of s 2 of the Banking and Financial Institutions Act 1989. The appellant is licenced to, inter alia, give credit facilities and conduct leasing business. That is the concept of lease financing. After all, it was the first respondent which applied for a leasing loan. It did not apply for a conventional loan. D E F

[43] It is preposterous to label the said lease agreement as a sham to cloak and disguise a money lending transaction. Lease as a concept involves a contract whereby the ownership, financing and risk taking of any equipment or asset are separated and shared by two or more parties. The lessor may finance and lessee may accept the risk through the use of it. Alternatively, the lessor may finance it and own it while the lessee enjoys the use of it and bears the risk as in the instant appeal. A lease transaction is a commercial arrangement whereby an equipment owner conveys to the equipment user the right to use the equipment in return for a rental. In other words, a lease is a contract between the owner of an asset (the lessor) and its user (the lessee) for the right to use the asset during a specified period in return for a mutually agreed periodic payment (the lease rentals). The important feature of a lease contract is separation of the ownership of the asset from its usage. Leasing contracts are more flexible so lessees can structure the leasing contracts according to their needs for finance. G H I

[44] Under the arrangement in the instant appeal, the said mill equipment is not physically exchanged but it all happens on record only. This is nothing but a paper transaction. Under this transaction the first respondent assumes the

role of the lessee and the appellant assumes the role of the lessor. The first respondent (lessee) borrows the purchase price from the appellant (lessor) and buys the said mill equipment and the appellant, as financier is paid off from the lease rentals directly by the first respondent. In the said lease agreement the first respondent acknowledges that the appellant is the owner of the said mill equipment. The said lease agreement was tailor-made in respect of the lease period and the lease rentals according to the convenience and requirement of the first respondent as lessee.

[45] Counsel for the respondents referred to a few cases on hire-purchase in the course of his arguments. We would think that hire-purchase differs from leasing. Lease financing is a commercial arrangement whereby an equipment owner conveys to the equipment user the right to use the equipment in return for a rental whereas hire purchase is a type of instalment credit under which the hire purchaser agrees to take the goods on hire at a stated rental, which is inclusive of the repayment of principal as well as interest with an option to purchase. In lease financing no option is provided to the lessee (user) to purchase the goods whereas in hire purchase such an option is provided to the user.

[46] Thus, a lease is in essence an extended rental agreement wherein the owner of the equipment (the lessor) allows the user (the lessee) to operate or otherwise make use of the equipment in exchange for periodical lease payments. How the said lease in the instant appeal can be equated to 'a sham to cloak and disguise the money lending transaction' escape us. As such, we find it difficult to comprehend the reasons put forth by the trial judge premised on the materials on record and we also find it difficult to comprehend the judgment of the Court of Appeal.

[47] With regards to the Bills of Sale Act 1950, as discussed earlier, the respondents contended in their defence that the appellant failed to comply with the provisions of this Act. In their counterclaim they sought a declaration that the said lease agreement was not valid as it did not comply with the provisions of the Bills of Sale Act 1950. In relation to this, the trial judge ruled that 'since it was (a) money lending transaction and the purported Lease Agreement had not complied with the Bills of Sale Act 1950, it is illegal and void for non-registration by virtue of s 4 of this Act'. The question here is whether the said agreement is a bill of sale and if it is one, whether it is void for non-registration under s 4 of the Bills of Sale Act 1950.

[48] In his grounds of judgment, the trial judge did not explain how he came to the conclusion that the said lease agreement is a bill of sale and hence void for non-registration. The Court of Appeal, on the other hand, did not deal with this issue at all. Further, we have also noted that the respondents have not

shown how the said lease agreement can be said to be a bill of sale falling within the contemplation of s 3 of the Bills of Sale Act 1950. What is a bill of sale? In a book titled *The Bills of Sale in Singapore and Malaysia* by Kala Anandarajah, the learned writer answered the question as follows (at pp 5–6):

> A bill of sale 'in its ordinary meaning is a document which is given where the legal property in goods passes to the person who lends money on them, but possession does not pass' (*Mills v Charlesworth* (1890) 25 QBD 421 at 424). The existence of a document is a pre-requisite to the existence of a bill of sale. In *Malick V Lloyd* (1913) 16 CLR 483 (at p 489), the High Court of Australia said that a bill of sale meant nothing more than an assignment of personal chattels in existence. The document must amount to an assurance or a transfer. A document which merely records the terms of a transfer of goods by delivery as security for money is not a bill of sale. Another important feature is that the grantee must have power to seize and take possession of the subject matter of the bill of sale; ie the contract must be capable of specific performance. What this means is that if possession is given to the grantee when the bill of sale is first created, the Act will not apply. Yet another important element of a bill of sale is that reliance must be placed upon the document to establish the transfer of title.
>
> There are two kinds of bills of sale: the absolute bill of sale and the conditional or security bill of sale. The conditional or security bill of sale is designed to secure a payment of money. The absolute bill of sale is given otherwise than as security for the payment of money.
>
> When s 3(1) of the Act [s 3(1) of the Malaysian Act] provides that a bill of sale include a 'bill of sale', it is not surprising that Sykes (The Law of Securities (4th Ed) at p 545) observes that the Act is 'remarkable for its clumsiness'. The definition in s 3(1) then stretches on for two pages and broadly encompasses all assignments in which the legal or beneficial ownership passes, or where a creditor is given a charge or security pursuant to which a right to take possession is conferred, or where a power to seize goods arises in equity, with possession continuing to remain with the grantor. More specifically, it can be divided into the following five categories:
>
> (a) assignments, transfers, declarations of trust without transfer, inventories of goods with receipt thereto attached, or receipts for purchase moneys of goods, and other assurances of personal chatties;
>
> (b) powers of attorney, authorities, or licences to take possession of personal chattels as security for any debt;
>
> (c) any agreement, whether intended or not to be followed by the execution of any other instrument, by which a right in equity to any personal chattels, or to any charge or security thereon shall be conferred;
>
> (d) every attornment, instrument or agreement whereby a power of distress is given or agreed to be given by any person to any other person by way of security for any debt or advance and whereby any rent is reserved or made payable as a mode of providing for the payment of interest on such debt or advance or otherwise for the purpose of such security only; and

A (e) agreements for the hire of personal chattels entered into for the purpose of securing the repayment to the lessor of such channels of money advanced by him to the hirer.

B **[49]** In his book in relation to the same question, viz, as to what is a bill of sale, Vinod Kothari said (at p 296):

> A Bill of Sale is a document by which the property in the goods is transferred from one person to another. In an ordinary contract of sale, no written document is necessary as the contract is completed by mere delivery. A bill of sale is designed for
C transactions in which the seller is to remain in possession of the goods after disposing of the property given. Since the transferee is not given the possession it is plainly necessary for his protection that he should have some document evidencing his title to the goods. For example, A is in need of finance. A is the owner of a machine under the Bill of Sale device. A sells the asset to B without transferring the delivery of the machine to A.

D

[50] In the instant appeal, the first respondent never sold the said mill equipment to the appellant. In the said lease agreement the first respondent acknowledged that the appellant is the owner of the said mill equipment. The
E first respondent is not the owner of the said mill equipment machinery neither did it disposed of the same to the appellant. Pursuant to the said lease agreement, the first respondent is paying rental for the use of the said mill equipment. That being the position, we cannot see how the said lease agreement can be said to be a bill of sale. As to whether the said lease agreement
F is a bill of sale is a question of fact to be determined by the trial judge. This, the trial judge failed to do so. The trial judge was wrong in assuming that the said lease agreement was a bill of sale and hence need to be attested and registered under the Bills of Sale Act 1950 just because the respondents pleaded so and counsel for the respondents said so.

G

[51] In the end result, as there are flaws in the conclusion of facts and the law reached by the trial court and the Court of Appeal, it is our decision that this appeal must be allowed. The judgment and all orders of the High Court and the Court of Appeal are accordingly set aside. As consequence thereof, we
H would order that judgment be entered against the respondents and grant the prayers sought in para 1(a), (b), (c) and (d) of the appellant's statement of claim. We would also order that the counterclaim of the respondents be dismissed with costs.

I **[52]** In relation to the questions of law posed by the appellant, we find no necessity to answer them. It is our decision that the evidence showed the said lease agreement was a bona fide transaction and is not prohibited by any Act of Parliament or void by reason of some principle of law. The first two questions were based on an assumption that the said lease agreement is a money lending

transaction and is a bill of sale under s 3 of the Bills of Sale Act 1950 and hence illegal and void under s 4 of the Act. The third question posed relates to estoppel which is a rule of evidence and this issue was never ventilated in the courts below. The fourth and fifth questions posed are superfluous under the circumstances of the instant appeal.

Appeal allowed and defendants' counterclaim dismissed with costs.

Reported by Kohila Nesan